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Supreme Court of the United States

October Term, 1950

No. 296

GENEVIEVE JOHNSON,

Petitioner,

vs.

ELEANOR MUELBERGER,

Respondent.

BRIEF OF RESPONDENT ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

LOUIS FLATO,
Attorney for Respondent,
11 East 44th Street,
New York City, N. Y.

LEROY G. EDWARDS,
SAUL HAMMER,
of Counsel.

INDEX

Subject Index

	PAGE
Statement of Jurisdiction	1
Opinions Below	1
Statement of Facts	2
Summary of Argument	6
Arguments in Support of Affirmance of Decision of Court Below—	
Point I—The Court of Appeals of the State of New York was not required to grant full faith and credit to the Florida Decree of Divorce	7
Point II—The right of respondent to challenge the validity of the Florida decree of divorce was not impaired by the decisions of this court in the cases of *Coe* v. *Coe* and *Sherrer* v. *Sherrer*	10
Point III—The Decree of Divorce against decedent was invalid in Florida and subject to attack there by respondent	15
Conclusion	26

Cases Cited

Bornes v. Miller, 61 So. 828 23

Chisholm v. Chisholm, 125 So. 694 ..... 17, 18

Coe v. Coe, 334 U. S. 378 ..... 6, 10, 11, 12, 13, 14, 15, 18

Curley v. Curley, 198 So. 584 16

PAGE

Davis v. Davis, 305 U. S. 32 ..... 12, 14
De Marigny v. De Marigny, 43 So. (2d) 442 ..... 6, 20, 21, 22, 23
Gaylord v. Gaylord, 45 So. (2d) 502 ..... 7, 20, 23
Hall v. Hall, 112 So. 622 23
Lindgrens Estate, In re, 293 N. Y. 18 ..... 7, 24
Masselotti v. Masselotti, 29 So. (2d) 873 23
Phillips v. Phillips, 1 So. (2d) 186 17
Senor v. Senor, 272 App. Div. 306, affd. 297 N. Y. 809 ..... 8, 21
Sherrer v. Sherrer, 334 U. S. 343 .. 6, 10, 11, 12, 13, 14, 15, 18
Stoll v. Gottlieb, 305 U. S. 165 ..... 12, 14
Urquhart v. Urquhart, 272 App. Div. 60, affd. 297 N. Y. 689 8
Wade v. Wade, 113 So. 374 17
Watson v. Watson, 174 S. E. 33, 172 S. C. 362 23
Williams v. State of North Carolina, 325 U. S. 226 ..... 6, 9, 13, 14, 21
Willys v. Chillingsworth, State ex rel., 168 So. 249 ..... 19, 23

STATUTES CITED

28 U. S. C.,
Section 1257 (3) 1

Decedent's Estate Law of New York,
Section 18 ..... 2, 24

New York Surrogate's Court Act,
Section 145a 24

Florida Statutes Annotated,
Section 65:02 16

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JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1257 (3). The Court below rendered its judgment on April 14, 1950 (R. 51). The time to file the petition for a Writ of Certiorari was extended to September 9, 1950 (R. 53) by an order of this Court made by Mr. Justice Burton on July 7, 1950. The order granting the Writ of Certiorari was entered November 6, 1950.

OPINIONS BELOW

The unreported opinion of the Surrogate's Court is to be found at page 39 of the record. The Appellate Division of the Supreme Court of the State of New York rendered a memorandum opinion reported in 275 App. Div. 848, and is to be found in the record at page 44. The opinion of the Court of Appeals is reported in 301 N. Y. 13, and appears in the record at page 45.

STATEMENT OF FACTS

The petitioner, Genevieve Johnson, pursuant to Section 18 of the Decedent's Estate Law of the State of New York, filed a notice of election to take against the last will of decedent (R. 4) upon the claim that she was the widow of decedent by virtue of a marriage to him in 1944 (R. 23), after the alleged divorce, which is the subject of respondent's attack in this proceeding, was procured against decedent by his former spouse, Madoline Johnson in Florida on August 17, 1942.

The evidence adduced by respondent in the Surrogate's Court established that decedent's prior wife was present in Florida, at most, 52 day prior to filing her Bill of Complaint in the Florida Court; that she and decedent were at all times domiciliaries of New York; that her sole purpose in going to Florida was to secure a divorce against decedent; that she procured the decree of divorce against decedent by false and perjured testimony and the perpetration of a fraud upon the Florida Court. This evidence was fully corroborated and documented and remained entirely uncontradicted and unimpeached by the petitioner.

The leading facts establishing these conclusions are succinctly summarized as follows and are to be found in the Record at the indicated pages:

Madoline Johnson (nee Ham) married the decedent in San Francisco, California, on April 15, 1939 (Pet. Exhs. 1 and 2 of 1/12/48), and came to New York with decedent to live in December, 1939 (R. 27).

Thereafter, she resided in New York with decedent at Austin Place, Kew Gardens, New York (R. 28); at Cambridge Avenue, Garden City, New York (R. 28) and at 12

Fifth Place, Garden City, New York (R. 28, 29), until before Thanksgiving of 1941 (R. 36).

In February, 1942, she returned to the decedent (Pet. Exhs. 4 and 5 of 5/12/48) and was residing with decedent at 12 Fifth Place, Garden City, New York (R. 14, 31 and 36).

During the month of April, 1942, she left the decedent and went to live at 9 North Poplar Street, West Hempstead, New York (R. 14, 15).

On April 13, 1942, Madoline Johnson filed with the Garden City, New York Post Office, a change of her address from 12 Fifth Place, Garden City to 9 North Poplar Street, West Hempstead (R. 13), and resided at 9 North Poplar Street until on or about June 7th, 1942, when she left New York for Pensacola, Florida where she occupied a cabin (R. 15, 16, 21).

On July 29, 1942, she filed a Bill of Complaint against the decedent for an absolute divorce in the Court of Record, of Escambia County, Florida, in which a final decree of divorce was entered against the decedent on August 17, 1942 (Pet. Exh. 3 of 1/12/48).

This is the decree attacked by respondent, in the proceeding below.

At all of these times, the decedent was not a resident of the State of Florida, but was a resident of the State of New York (Paragraph 2, Page 1 of Pet. Exh. 3 of 1/12/48, Resp. Exh. A of 5/12/48).[1]

[1] For the purpose of accuracy, it should be noted at this point, that although decedent, through attorneys filed an answer denying the allegations of misconduct, the record does not indicate the attendance of decedent at the hearing or any participation by him therein

Even assuming that she arrived at Pensacola on the day she left New York, June 7, 1942, only 52 days elapsed until July 29, 1942, when she filed her Bill of Complaint for divorce.

The testimony in the court of first instance further conclusively established that Madoline Johnson procured the decree of divorce by false and perjured testimony and the perpetration of a fraud upon the Florida Court.

In her bill of complaint for divorce, Madoline Johnson alleged that for two years next prior to her filing her bill of complaint on July 29, 1942, she resided in Pensacola, Florida (Pet. Exh. 3 of 1/12/48).

Within this claimed two year period, the evidence adduced below is uncontradicted and unimpeached that Madoline Johnson:

In July of 1940, with decedent, was residing at 59 Cambridge Avenue, Garden City, New York (R. 28, 29, 34, 35), under the terms of a written lease, executed both by her and decedent (Pet. Exh. 1 of 5/12/48);

In March of 1941, together with decedent, moved their residence from 59 Cambridge Avenue to 12 Fifth Place, Garden City, Long Island, New York (R. 29, Pet. Exh. 2 of 5/12/48);

From March of 1941 to just before Thanksgiving of 1941, resided with decedent at 12 Fifth Place, Garden City, New York, when she left the decedent (R. 30, 36);

In February of 1942, returned to her home at 12 Fifth Place (R. 31, 36, Pet. Exhs. 4 and 5 of 5/12/48), where she

continued to reside until April of 1942, when she moved to 9 North Poplar Street, West Hempstead, New York (R. 13, 14-15, 31), and resided at 9 North Poplar Street until within a day or two after June 5, 1942, went to Florida (R. 15-17, 21), solely for the purpose of obtaining a divorce (R. 69, Pet. Exh. 3 of 5/12/48) and returned to 9 North Poplar Street, West Hempstead, shortly after securing the Florida decree (R. 17);

Went to Elkton, Maryland, within a few days after her return from Florida and there on August 30, 1942, obtained a marriage license, registering 9 North Poplar Street, West Hempstead, Long Island, as her residence (Pet. Exh. 4 of 1/12/48);

On August 30, 1942, married the witness, Burroughs (Pet. Exh. 4 of 1/12/48) and returned to 9 North Poplar Street, West Hempstead, New York where for two years she continued to live with the witness Burroughs (R. 18);

Maintained her bank account, opened in June of 1940 at the Garden City Trust Company, Garden City, Long Island, New York, and used it to pay the fees of her Florida attorneys (Pet. Exh. 6 of 5/12/48);

Maintained without change or correction her New York State Motor Vehicle Operator's License, issued in January, 1940, in which she gave her legal residence as 8267 Austin Street, Kew Gardens, Long Island, New York (Pet. Exh. 6 of 5/12/48), until its renewal in June 1943, when she noted a change in her name to Burroughs and a change of legal residence to 9 North Poplar Street, West Hempstead, New York (Pet. Exh. 7 of 5/12/48).

SUMMARY OF ARGUMENT

Inasmuch as the attack upon the decree was made by one not a party to the divorce action, the Court below, exercising the policy of the State of New York, properly entertained an inquiry into the jurisdiction of the Florida Court to render a decree affecting parties who were residents of the State of New York.

It being conclusively established that complainant had resided in Florida less than the 90 day period required to confer jurisdiction upon the Florida Court, the Court below was justified in refusing to grant the Florida decree full faith and credit.

The right of the Court of Appeals to inquire into the jurisdiction of the Florida Court and to refuse it full faith and credit is permitted under the ruling of this court in the case of *Williams* v. *State of North Carolina, infra.*

Petitioner's claim that the decision of the Court below is violative of the principle of law laid down by this Court in the cases of *Coe* v. *Coe* and *Sherrer* v. *Sherrer, infra,* cannot be supported for these cases are not in point on the essentially basic factor presented by the case at bar, since these cases involve subsequent attacks by spouses who were not only parties to the divorce action, but had appeared therein and actively participated in the trials thereof which resulted in adjudications on the merits. This Court, in the *Coe* and *Sherrer* cases, made it clear that it did not intend, by its decisions, to prevent an attack upon a foreign decree of divorce if such decree was invalid or could be subjected to collateral attack in the State where rendered.

The adoption, by the State of Florida, in the decisions of its Supreme Court in the cases of *De Marigny* v. *De*

Marigny and *Gaylord* v. *Gaylord, infra,* of a policy restricting attacks by third parties, cannot limit the constitutional perogatives of the State of New York with respect to the marital status of its citizens. To permit a limitation by the decretal State to foreclose inquiry by sister states into an unfounded assumption of jurisdiction would be to impose upon all states the acceptance of invalid divorces and result in destroying the necessary prerequisite of jurisdiction to granting full faith and credit to foreign decrees.

POINT I

The Court of Appeals of the State of New York was not required to grant full faith and credit to the Florida Decree of Divorce.

The Court of Appeals of the State of New York, in furtherance of the State's interest in the matrimonial status of its citizens and the rights, property interests and responsibilities that flow therefrom, established the rule that third parties might challenge, for lack of jurisdiction, the right of a foreign court to decree a termination of that status in the case of *In re Lindgren's Estate,* 293 N. Y. 18.

In that case the wife of the decedent, divorced by him in an action in Florida in which she had appeared; in her capacity as guardian *ad litem* of an infant child of her marriage to decedent, sought letters of administration of his estate and contested the right to such letters by the wife of the decedent by a subsequent marriage, upon the claim that the decree of divorce obtained by the decedent against her in Florida was void for lack of jurisdiction, the decedent never having acquired a bona fide residence in Florida.

Although acting through her mother, who had been a party to the Florida action, the attack upon the decree, in actual effect, was made by the daughter and sole distributee of the decedent.

In holding that the petitioner, a third party to the decree of divorce had a right to attack the validity of the Florida decree, the Court below stated at page 23:

> "The divorce action brought by the decedent in 1939 and the subsequent appearance therein by the petitioner did not suffice to confer upon the Florida Court jurisdiction of the subject matter of the action. It has been established in the present proceeding that neither party to that action was a domiciliary of Florida before the complaint was filed. It is that lack of domicile which deprived the foreign court of jurisdiction. In those circumstances the courts of this State did not violate the full faith and credit clause of the Federal Constitution when in this proceeding they refused to give effect to the Florida divorce decree of 1939."

This rule was twice reiterated by the Court below by its affirmance without opinion of the decisions of the Appellate Division of the Supreme Court of the State of New York, First Department, in the cases of *Urquhart* v. *Urquhart,* 272 App. Div. 60, affirmed in 297 N. Y. 689 and *Senor* v. *Senor,* 272 App. Div. 306, affirmed in 297 N. Y. 809.

In the *Urquhart* v. *Urquhart* case, the Appellate Division, in its opinion stated at page 63:

> "Matter of Lindgren (293 N. Y. 18) requires an affirmance of the order denying the motion to dismiss the complaint. The decision therein does not appear to have turned on the belated appearance of the defendant in the Florida action, but rather upon the

> circumstances that the child of the marriage had not been a party to the divorce action, notwithstanding the contention that neither of the 'two parties could thereafter challenge the validity of the foreign court's decree' (p. 22, citing Krause v. Krause, supra, decided under the quasi-estoppel doctrine)."

To similar effect the Appellate Division held in the case of *Senor* v. *Senor,* at page 311:

> "Where persons having no complicity in the divorce proceedings have legitimate interests in a determination of the validity of the divorce, they may arouse the State's interest and institute an inquiry, which our courts will entertain to ascertain the validity of a divorce decreed by a foreign state as to persons alleged to have been at the time residents of this State. Matter of Lindgren, 293 N. Y. 18, supra; Urquhart v. Urquhart, 272 App. Div. 60)."

The court goes on to say at page 313:

> "That authority is amply affirmed and vindicated by the rule that third parties may at all times challenge the decree. (Matter of Lindgren, 293 N. Y. 18, supra; Urquhart v. Urquhart, supra). The infirmity in the decree remains constant and its vulnerability to the attack of third parties is sufficient protection of society's interest. It is not necessary to go further and hold that the parties themselves may impeach the decree whenever it suits their purpose."

The same rule was established by this Court in the case of *Williams* v. *The State of North Carolina,* 325 U. S. 226, wherein it said at page 230:

> "It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions have been afforded to all who had an interest in its adjudication. This applies also to

jurisdictional questions. After a contest these cannot be relitigated as between the parties. Forsyth v. Hammond, 166 U. S. 506, 517; Chicago L. Ins. Co. v. Cherry, 224 U. S. 25, 30; Davis v. Davis, supra. But those not parties to a litigation ought not to be foreclosed by the interested actions of others; especially not a State which is concerned with the vindication of its own social policy and has no means, certainly no effective means, to protect that interest against the selfish action of those outside its borders."

The Court below was, therefore, justified in refusing to grant full faith and credit to the Florida decree of divorce by sustaining respondent's challenge to its validity.

POINT II

The right of respondent to challenge the validity of the Florida Decree of Divorce was not impaired by the decisions of this court in the cases of *Coe* v. *Coe* and *Sherrer* v. *Sherrer*.

The right of the Court below to inquire, at the instance of one not a party to the action, into the jurisdiction of the Florida Court to grant a decree of divorce affecting domicillaries of the State of New York remained unaffected by the decisions of this court in the cases of *Coe* v. *Coe*, 334 U. S. 378, and *Sherrer* v. *Sherrer*, 334 U. S. 343, and its decision sustaining Respondent's challenge was not, as petitioner claims in her brief, violative of the rulings in the *Sherrer* and *Coe* cases, *supra*.

The *Coe* and *Sherrer* cases, it is respectfully submitted, are not determinative of the issues presented in the instant

case, and are not in point in the essentially basic factor presented by the case at bar.

Both of these cases involved subsequent attacks by spouses, who were not only parties to the divorce action, but had appeared in the action, filed answers, personally appeared at the trial and had actively participated in the proceedings which resulted in adjudications on the merits.

In the *Sherrer* case, the defendant's husband entered a general appearance and subsequently, through an attorney, filed an answer in which he alleged that the plaintiff was not a bona fide resident of the State of Florida. In addition, he appeared and testified at the trial of the divorce proceedings. In this connection this court stated at page 352, of its opinion:

> "Respondent participated in the Florida proceeding by entering a general appearance, filing pleadings, placing at issue the very matters he sought subsequently to contest in the Massachusetts Courts, personally appearing before the Florida Court and giving testimony in the case."

In the *Coe* case, the attack on the Nevada decree in the Massachusetts Court was made by a wife who had been the defendant in the Nevada action for divorce. She had appeared in the action, filed an answer and in her answer filed a cross-complaint for divorce. She, as well as her husband, the plaintiff in the Nevada divorce action, appeared and testified upon the trial and after trial and she, as defendant, was granted a decree of divorce upon her cross-complaint.

On this score this court, pointed out at page 384:

> "It is abundantly clear that respondent participated in the Nevada divorce proceeding. She ap-

peared personally and gave testimony at the hearing. Through her attorneys, she filed pleadings in answer to petitioner's complaint and successfully invoked the jurisdiction of the Nevada Court to obtain the decree of divorce which she subsequently subjected to attack as invalid in the Massachusetts Courts."

It would appear that this court in these cases regarded as determinative the factor that the foreign decree was being subjected to attack by the party to the original proceedings, and so stated at page 349:

> "The question with which we are confronted, therefore, is whether such a finding made under the circumstances presented in this case may consistent with the requirements of full faith and credit be subjected to collateral attack in the Courts of a sister State *in a suit brought by the defendant in the original proceedings.*" (Italics ours.)

It similarly stated in its opinion in the *Coe* case:

> "In the Sherrer case we concluded that the requirements of full faith and credit preclude the courts of a sister state from subjecting such a decree to collateral attack by readjudicating the existence of jurisdictional facts. *That principle is no less applicable where, as here, the party initiating the collateral attack is the party in whose favor the decree was entered.*" (Italics ours.)

In arriving at its conclusion in these cases, this Court enunciated and established no new principle of law, or modified any existing rule but followed squarely its previous decisions in the cases of *Stoll* v. *Gottlieb*, 305 U. S. 165, and *Davis* v. *Davis*, 305 U. S. 32, holding that the parties to a divorce action who had appeared and unsuccessfully

raised the issues of domicile and jurisdiction were held bound by the adjudication against them and barred from a subsequent re-litigation in a collateral attack upon the decree in a sister state.

It would appear that this Court's decisions in the *Coe* and *Sherrer* cases, *supra,* were intended by it neither as an extension of the rule laid down in the *Stoll* v. *Gottlieb* and *Davis* v. *Davis* cases, *supra,* nor to impose an additional limitation of the fundamental principles reiterated by it in the case of *Williams* v. *The State of North Carolina, supra.*

It so stated at page 351 of the *Sherrer* case:

> "We believe that the decision of this Court in the Davis case and those in related situations, are clearly indicative of the result to be reached here. These cases stand for the proposition that the requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the Courts of a sister state where there has been participation by the defendant in the divorce proceeding, where defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the Courts of the State which rendered the decree."

Nothing said by this Court, in its opinion in the *Coe* and *Sherrer* cases, changes the position taken by it in the *Williams* v. *State of North Carolina* case, *supra,* wherein it said at page 229:

> "A judgment in one state is conclusive upon the merits in every other state, but only if the court of the first state had power to pass on the merits—had jurisdiction, that is to render judgment.

> "It is now too late to deny the right collaterally to impeach a decree of divorce made in another state, by proof that the court had no jurisdiction, even when the record purports to show jurisdiction • • • It was 'too late' more than forty years ago. German Sav. & L. Soc. v. Dormitzer, 192 U. S. 125, 128."

After enunciating the new principle that one spouse could establish a domicile apart from the other, this court, in the second *Williams* case, reiterated the long established fundamental principle that the state of domicilliary origin had the right to inquire into the jurisdictional authority of a foreign state to grant a decree of divorce, and refuse to grant it faith and credit for lack of domicile. In doing so it would seem that this court made it clear that it intended no extension or relaxation of the rule laid down by it in the *Davis* v. *Davis* and *Stoll* v. *Gottlieb* cases, *supra,* that one who had actively participated in a divorce proceeding, after having been afforded full opportunity to contest the issue of jurisdiction, would be barred from a collateral attack upon the resulting decree. This, it made clear in a footnote at page 230 of its opinion in the *Williams* case stating that:

> "We have not here a situation where a state disregards the adjudication of another state on the issue of domicile squarely litigated in a truly adversary proceeding."

The decision of the Court below quite properly followed the rule of the second *Williams* case and was in no way violative of this Court's decisions in the *Coe* and *Sherrer* cases.

POINT III

The Decree of Divorce against decedent was invalid in Florida and subject to attack there by respondent.

This Court appears to have made it evident that the rule laid down in the *Coe* and *Sherrer* cases, *supra*, were not intended, despite the participation of the parties, to prevent an attack upon a foreign decree of divorce if such decree was invalid in the State where rendered or could there be subjected to collateral attack.

This Court so stated at page 348 of the *Sherrer* case, *supra*:

> "It should also be observed that there has been no suggestion that under the Law of Florida, the decree of divorce in question is in any respect invalid or could successfully be subjected to the type of attack permitted by the Massachusetts Courts. The *implicit assumption underlying the position taken by the respondent and the Massachusetts Court is that this case involves a decree of divorce valid and final in the State which rendered it; and we so assume.*" (Italics added.)

To similar effect is the opinion in the *Coe* case, *supra*, at page 383:

> "It is clear that the decree of divorce in question is valid and final in the State in which it is rendered and under the laws of Nevada may not be subjected to the collateral attack permitted in this case in the Massachusetts Courts. *Respondent does not urge the contrary.*" (Italics added.)

The attack against the Florida decree was predicated upon the failure of decedent's spouse to even quantitatively

meet the basic requirement of the Florida statutes to confer jurisdiction in an action for divorce.

The conclusive and uncontradicted evidence adduced by respondent in the Court of first instance, found and followed by the Court below (R. 46) patently and obviously disclosed the invalidity of the Florida decree.

It was established that she had resided in Florida, only 52 days prior to filing her bill of complaint. As was similarly proven, this limited residence had for its sole purpose the securing of a divorce against the decedent, and, therefore, had not the bona fide character required to constitute domicile in Florida. However, even if it had, the length of her residence was insufficient to confer jurisdiction and enable her to secure a divorce.

Section 65:02 of the Florida Statutes Annotated requires that:

> "In order to obtain a divorce, the complainant must have resided ninety days in the State of Florida before the filing of the bill of complaint."

The Supreme Court of Florida has defined this period as being the ninety days next preceding the filing of the bill of complaint.

It so held in the case of *Curley* v. *Curley*, 198 So. 584, at page 586:

> "Therefore it is our conclusion that the burden of proof in this case was on the plaintiff's wife to show that she had resided in Florida for a period of ninety days next prior to the date of filing the suit for divorce and at the time of taking up her residence in Florida, she had the capacity to acquire a separate domicile of her own in the State of Florida."

To similar effect is the holding of the Florida Supreme Court in the case of *Chisholm* v. *Chisholm*, 125 So. 694, at page 701:

> "It may not be essential to the granting of a divorce that the bill of complaint should do more than allege the 'residence' of complainant substantially in the language of the statute, but the evidence to sustain it must show that complainant has 'resided' bona fide in this state for the two years next preceding the date of filing the bill of complaint."[1]

The failure to acquire the necessary 90 days residence is jurisdictional under the Florida Law.

This was held by the Florida Supreme Court in the case of *Phillips* v. *Phillips*, 1 So. (2nd) 186, at page 190:

> "The matter of residence for the statutory period is jurisdictional and jurisdiction cannot be acquired or exercised by or pursuant to agreement between the parties. Jurisdiction cannot be assumed on decree pro confesso."

Submission by the parties to the court on admission of residence in their pleadings is insufficient to establish the Court's jurisdiction.

This was held by the Florida Supreme Court in the case of *Wade* v. *Wade*, 113 So. 374, at page 375:

> "Such residence being jurisdictional, an admission thereof by the parties in their pleadings is ineffectual as a substitute for proof. The requisite

[1] The *Chisholm* case was decided prior to the amendment of the Florida statute reducing the period of residence from two years to ninety days, being in every other respect, identical with the present section, quoted above.

> residence must be alleged in the bill and established by the proof. This is not an instance in which facts going to the jurisdiction may be admitted by the parties."

In the case of *Chisholm* v. *Chisholm, supra,* the Florida Supreme Court, similarly held at page 704:

> "It would seem that the Court had no jurisdiction of the action by virtue of lack of domicil. More than a year later defendant attacked the decree. The concurring opinion felt that the defendant had failed to use diligence and that defendant should not now be heard to question the sufficiency of evidence in support of grounds for divorce."

The opinion goes on to state:

> "The jurisdictional infirmity because of complainant's residence in Florida, however, is fatal to the decree notwithstanding the defendant's inattention to the suit. Because of the showing made in that behalf, I concur in the order of reversal."

Madoline Johnson having failed to acquire the requisite residence of 90 days prior to filing her bill of complaint, the Florida Court never acquired jurisdiction to render its decree, and the decree granted is, therefore, void. Lacking the necessary domiciliary requirement and having obtained the decree by false and perjured evidence and the perpetration of a fraud upon the Florida Court, the decree is invalid.

The case at bar is to be further distinguished from the effect of the ruling in the *Coe* and *Sherrer* cases, *supra,* in that under the Florida law, the decree here was subject to attack in the courts of Florida.

In the case of *State ex rel., Willys* v. *Chillingsworth*, 168 So. 249, Virginia Willys de Landa filed a bill of complaint in the Circuit Court of Palm Beach alleging that she was the only daughter and heir-at-law of John N. Willys, decedent and that Florence K. Willys claimed to be the widow of decedent and entitled to rights and interests in his estate. Her bill of complaint also charged that Florence K. Willys was in fact not decedent's widow, because she was the lawful wife of one, Harold J. Dolan, when she married decedent, since a divorce she attempted to obtain from Dolan in the Circuit Court of Dade County was fraudulently obtained. It was further alleged in her bill of complaint that decedent had left the major portion of his estate to Florence K. Willys and but a small portion to her and that she had filed objections to the probate of the will, and prayed that Florence K. Willys, accordingly, be decreed to have no interest in the estate of decedent.

Florence K. Willys instituted a prohibition proceeding challenging the jurisdiction of the court to adjudicate the questions raised in the bill of complaint of Virginia Willys de Landa upon the ground, among other things, that as sole heir-at-law and daughter of the decedent she was not entitled to have jurisdictionally determined and fixed the relative rights of herself and the alleged widow of decedent.

In upholding her right to thus attack the decree of divorce, the court stated at page 257:

> "The rule is settled in this state that respondent, being heir to her father's estate, has a right to question the validity of his marriage to petitioner. Rawlins v. Rawlins and Kushmsted v. Trunwall, supra.
>
> The validity of the marriage of John N. Willys to Florence E. Dolan Willys is determined by the valid-

ity of the divorce decree in Dolan v. Dolan which was entered in Dade County, October 25, 1933. The bill challenging the validity of the decree in Dolan v. Dolan was filed February 7, 1936, in Palm Beach County, less than 3 years after said decree was entered. The Circuit Courts of Dade and Palm Beach Counties are courts of co-ordinate jurisdiction and the decree in Dolan v. Dolan appears to be the real gravamen of the litigation.

The cases relied upon by respondent support her contention, but they differ in material respects from this case. In view of the fact that the final decree in Dolan v. Dolan was not appealed from, that courts of chancery have inherent power to correct their decrees, that it was predicated on intrinsic fraud, and is the real gravamen in the litigation, this court has reached the conclusion that the orderly administration of justice would be best served by giving the Circuit Court of Dade County the opportunity to correct its decree if it was fraudulently obtained. Byrant v. Byrant, 101 Fla. 177, 133 So. 635, Cone v. Cone, 112 Fla. 793, 136 So. 466, Miller v. Griffin, 99 Fla. 976, 128 So. 416."

In Point II of her brief, petitioner urges that the court below erred in concluding that the State of Florida permitted a collateral attack by a stranger to a divorce decree and overlooked the recent decisions on this point rendered by the Florida Supreme Court in the cases of *De Marigny* v. *DeMarigny*, 43 So. (2d) 442, and *Gaylord* v. *Gaylord*, 45 So. (2d) 507.

It is to be noted that when the instant case was taken to the New York Court of Appeals, these cases had not yet been decided by the Florida Supreme Court and that the

attention of the court below had not been directed to these cases by the petitioner in the points made in the brief submitted by her to that Court.

It is, however, respectfully submitted that consideration of these cases could not have affected the conclusion of the court below. The constitutional right of the State of New York to regulate the domestic affairs of its citizens could no more be impaired by a policy adopted by the State of Florida to restrict and limit attacks upon its court's jurisdiction, than it could by an easy and unfounded assumption of jurisdiction by the Florida Court in the first instance.

The fact that the Florida Court may have, in its decree, recorded a finding of its jurisdiction cannot, as this court stated in the second *Williams* case, *supra*, "foreclose examination by another State. Otherwise as we pointed out long ago, a Court's record would establish its power and the power would be proved by the record." Analogously, the policy of the State of New York, adopted in the exercise of its constitutional authority over the marital affairs of its residents, may not be impaired or limited by the policy by a foreign state designed to restrict or eliminate, in its courts, attacks upon its invalid decrees, adopted in furtherance of a desire to enhance, if possible, the attractiveness of its "easy divorces".

An analysis of the *De Marigny* case, *supra*, indicates that Florida has adopted a policy with respect to attacks upon divorce decrees by third parties, in direct variance with that prevailing in the State of New York. At page 446 of its opinion, the Florida Supreme Court states its difference from the policy of New York, as expressed in the case of *Senor* v. *Senor*, *supra*, and concludes that it

prefers to leave the parties to a divorce action where it found them, even though to do so would be to sanction a fraudulent decree.

To permit the State of Florida to thus limit attacks upon its decrees by the State of New York, it to permit, ultimately, the elimination of any attack and so effect the imposition of Florida's tourist-minded, pleasure-bent divorces upon all the states of the nation without regard to their own laws and policies on the subject of the marital status and rights of their own citizens.

To urge that the court below could not entertain an attack upon a decree granted by a Florida Court, when the record unequivocably established that complainant's residence in Florida was less than the period required by the Florida statutes to create in its courts the power and authority to act, is to urge that, no residence whatever is required by a complainant if the formality of an appearance is indulged in by a defendant. To accept such a thesis is to conclude that a marriage may be dissolved by consent of the parties without cause or reason, beyond their mutual desire, and such dissolution binding on all persons in all states—a condition which even the accommodating policy of Florida would not appear to countenance.

Respondent desires to point out in any event, that the limitation sought to be imposed against the attack upon a divorce decree by one not a party to the action would not have prevented an attack by this respondent in Florida. It is to be noted that in the *De Marigny* case, the Florida Court found that the divorce decree did not effect the status or right of the attacking party that existed at the time of the entry of the decree. The respondent, as the daughter and

next of kin of decedent, had a status at the time the decree was rendered. As defined by the Florida Supreme Court in the case of *State ex rel., Willys* v. *Chillingsworth, supra,* this status gave her the right to attack the divorce decree even under the ruling in the cases of *De Marigny* v. *De Marigny* and *Gaylord* v. *Gaylord supra.*

It is also to be noted that the Courts of Florida do not in all cases preclude an attack upon a fraudulent decree by a party who has appeared in the action. In the cases of *Barnes* v. *Miller,* 61 So. 828, *Hall* v. *Hall,* 112 So. 622 and *Masselotti* v. *Masselotti,* 29 So. (2d) 873, the Florida Court has permitted attacks upon judgments claimed to have been procured by fraud when the attacking party was not a party to the fraud practiced upon the court.

In the case at bar, the record is barren of any indication that decedent was a party to the fraud perpetrated upon the Florida court by Madoline Johnson or that he in any way had knowledge of the fact that Madoline Johnson had not resided in Florida for a period of 90 days next preceding the filing of her complaint. At no time has petitioner so asserted at any point during the instant case.

In Point I of her brief, petitioner contends that respondent, as heir-at-law of decedent, stands in his shoes, and that she therefore is estopped from making any assertion he could not. In support of this contention, the petitioner cites the case of *Watson* v. *Watson,* decided by the State of South Carolina, 174 S. E. 33, 172 S. C. 362, from which it would appear that there was there involved property rights passing by descent and a widow's right of dower.

This does not here obtain, as appears to have been conceded by the petitioner when she points out later in Point

I of her brief, that respondent's contest of petitioner's right to take against the will flows from her status as sole beneficiary under the will.

Actually, no question of derivative property rights is here involved. The right to dower on a deceased husband's realty no longer exists in the State of New York. Under Section 18 of the Decedent's Estate Law, the State of New York grants to a widow the right to elect to take against the last will of decedent, as in intestacy. This is a personal right, not passing with or attaching to decedent's property and is granted only to one having the status of widow, and does not come into being until the election of the right is exercised. Without the status of widow, the right to elect may not be exercised. Under Section 145a of the Surrogate Court Act of the State of New York, anyone interested may obtain a determination of the right to make such an election, and this would include creditors of the estate as well as legatees.

That there is here involved a question of the exercise of a personal right rather than a derivative property right is attested by the holding of the Court of Appeals of the State of New York in the case of *In re Lindgren Estate, supra* where the court stated at page 22:

> "It is said that when both parents of the child appeared in the Florida court in the manner disclosed by the present record neither of those two parties could thereafter challenge the validity of the foreign court's decree. See Vernon v. Vernon, 288 N. Y. 503, 41 N.E. 2d 792; Krause v. Krause, 282 N. Y. 355, 357, 26 N.E. 2d 290; Restatement of the Law of Judgments, Pps. 19; Restatement of the Law of Conflict of Laws, P. 112. With such parental disa-

bility as a basis for her argument the appellant asserts that the child is in privity of estate with the decedent and thus is burdened with the same disability to challenge the validity of the Florida decree of divorce.

We think that under facts disclosed by this record the law does not visit upon the child the disability thus imposed upon the parents. The rights which are asserted in this proceeding are not property rights to which either parent has claimed to be entitled. There is no claim that the estate will derive special benefit or suffer special disadvantage in the appointement of either of the two present claimants to letters of administration. It may well be that the decedent or his personal representative acting in his behalf could not question the Florida decree. Hynes v. Title Guarantee & Trust Co., 273 N. Y. 612, 7 N.E. 2d 719. In this proceeding however, it is neither a right of the decedent or of his estate which is the subject matter of inquiry. The petitioner attacks the validity of the Florida decree in behalf of the decedent's daughter—not in behalf of the decedent or of his estate or of the petitioner herself. By applying appropriate principles to the facts of record a choice must be made between the right, under Section 118 of the Surrogate's Court Act, of the petitioner, as guardian of the decedent's only child, to administer his estate and the right, under the same statute, of the appellant who claims to be his widow. In each instance we are dealing with matters personal to the claimant; not to the decedent or his estate. As to the child they are independent rights to which she claims to be legally entitled as the sole distributee of her father's estate"

CONCLUSION

The judgment of the Court of Appeals of the State of New York should be affirmed in all respects.

Respectfully submitted,

LOUIS FLATO,
Attorney for Respondent,
11 East 44th Street,
New York City, N. Y.

LEROY G. EDWARDS,
SAUL HAMMER,
of Counsel.

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